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Supreme Court, U.S.
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CASE NO.

in the Supreme Court of the United States

October Term, 1987

H.K. PORTER COMPANY, INC.

Petitioner,

vs.

METROPOLITAN DADE COUNTY

Respondent.

On Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

H. K. PORTER COMPANY, INC., does not have a parent company. Its subsidiaries are wholly owned. The individual controlling the stock in H. K. PORTER also has controlling interest in Fan Steel, Inc.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A DOT PROGRAM REQUIRING FEDERAL GRANT RECIPIENTS TO ESTABLISH MBE SUBCONTRACTING QUOTAS FOR THEIR GRANT FUNDED CONTRACTS, WHICH NEITHER INFORMS THE GRANT RECIPIENTS OF ESSENTIAL INFORMATION CONCERNING THE PAST DISCRIMINATION TO BE REMEDIED, NOR REQUIRES THE GRANT RECIPIENTS TO MAKE THEIR OWN FINDINGS OF PAST DISCRIMINATION, IS ON ITS FACE UNCONSTITUTIONAL AND VIOLATIVE OF TITLE VI OF THE CIVIL RIGHTS ACT, 42 USCA §2000(D)?

II.

WHETHER A 5% MBE SUBCONTRACTING GOAL IMPOSED BY DADE COUNTY, FLORIDA IN CONNECTION WITH A MINORITY PREFERENCE PLAN CAN BE VALIDATED SIMPLY BECAUSE OTHER COURTS HAVE APPROVED HIGHER PERCENTAGE GOALS FOR OTHER MINORITY PREFERENCE PLANS, WHEN THE REVIEWING COURT SPECIFICALLY FINDS THAT NO EFFORT WAS MADE TO DETERMINE THE AVAILABILITY OF QUALIFIED MINORITIES OR NARROWLY TAILOR THE REMEDY TO ANY HISTORY OF PAST DISCRIMINATION?

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THE OPINIONS OF THE COURTS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 324 (11th Cir. 1987). The District Court opinion was not published but is included in the Appendix.

JURISDICTION

This petition presents for review a decision of the United States Court of Appeals for the Eleventh Circuit which was dated and filed on August 24, 1987. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. Amend XIV, §1

42 USC §2000(d)

49 US §1615(a)(1)

DOT Circular 1165.1 (December 30, 1977)

DOT Order 4000.7A (March 6, 1978)

STATEMENT OF CASE

This case concerns a contract for the manufacture of the electrified third rail for the Dade County, Florida Metrorail project, identified as Contract Y-621 (Option 2). Metrorail is 80% funded through grants from the Urban Mass Transportation Administration (UMTA). The MBE provision of Contract Y-621 required five percent MBE participation and required the bidder to list in its bid the specific MBE subcontractors it would use. HK Porter was the low bidder, but was denied contract Y-621 because it failed to comply with the Minority Business Enterprise (MBE) requirements of that contract.

The MBE provisions of Contract Y-621 were prompted by Department of Transportation (DOT) Order 4007.7A (March 6, 1978) and UMTA's Circular 1165.1 (December 30, 1977). The DOT order required all grant recipients including Dade County to establish MBE contracting goals for all DOT funded projects. MBEs were defined to include Blacks, Hispanics, Asian Americans, American Indians, Alaskan natives and women. The contracting goals were to be established according to the guidelines set forth in UMTA Circular 1165.1. However, the UMTA Circular was only a general statement regarding the parameters of a program. It did not prescribe MBE percentage goals, or any method for setting percentage goals or for determining the extent to which various minority groups had been the victims of prior discrimination:

> "UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances."[1]

The UMTA circular, however, did make it clear that "[t]he setting of goals is an attempt to match projected procurements with available, qualified MBEs. Goals should be related to the availability of MBEs."[2] The Secretary of Transportation's order specifically provided that any MBE program include "reasonable written justification for those goals."[3]

The County, however, has admitted that:

1. *it made no investigations or findings* of discrimination in the awarding of contracts such as Y-621[4] against any of the groups defined as "minority persons";

2. *it made no investigations or findings* regarding the need for a racially or sexually preferential program in the awarding of Contract Y-621 to

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[1]UMTA's circular 1165.1, at 6 (December 30, 1977), Petitioner's Trial Exhibit No. 8.

[2]UMTA's circular 1165.1, at 6 (December 30, 1977), Petitioner's Trial Exhibit No. 8.

[3]D.O.T. Order 4007.7A §7(b)(1)(c)(3), p. 5.

[4]Answer to paragraph 57 of Request for Admissions (R1-15, R1-18, R1-22).

overcome the present effects of past discrimination;[5]

3. *it made no investigations or findings* regarding whether a 5% goal or quota was either necessary or sufficient to accomplish the remedial result of overcoming the present effects of past discrimination;[6]

4. *it made no inquiries* into whether 5% MBE participation was a reasonably obtainable goal or quota in connection with Y-621,[7] and is not aware of any MBE that Porter could have used in connection with Contract Y-621.[8]

5. *it had no knowledge* of any congressional determination that minority business enterprises have been discriminated against in the award of contracts in the rapid transit or contact rail industry, or that a racially or sexually preferential remedy is needed to

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[5]Answer to paragraph 58 of Request for Admissions (R1-15, R1-18, R1-22).

[6]Answer to paragraph 59 of Request for Admissions (R1-15, R1-18, R1-22).

[7]Answer to paragraph 60 of Request for Admissions (R-15, R-18, R1-22). The Trial Court, after a hearing on the County's motion to withdraw this admission, refused to allow the County to withdraw the admission. Order dated May 9, 1986, page 8-9 (R3-92-8).

[8]Transcript of hearing before Judge Kehoe, December 20, 1979, at 17-18, Petitioner's Trial Exhibit No. 16.

overcome any present effects of any such past discrimination.[9]

UMTA Circular 1165.1, moreover, recommended that the County maintain a minority contractor list to aid bidders in finding MBEs qualified to bid on the Metrorail project.[10] The County did *not* have such a list available for Contract Y-621, and so stated in the bid documents.[11]

The five percent MBE participation requirement of contract Y-621 was not based upon any previous knowledge, investigation or calculation made by the County.[12] Instead, the five percent MBE participation requirement was imposed summarily, by administrative officials.[13] The Board of County Commissioners did not consider or approve the 5% goal, nor did UMTA or any federal agency.[14]

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[9]Answer to paragraph 55 and 56 of Request for Admissions (R1-15, R1-18, R1-22) and Interrogatories 18 and 19 (R1-20, R1-22).

[10]UMTA's circular 1165.1 paragraph 6 at 11, Petitioner's Trial Exhibit No. 8.

[11]Addendum to Contract Y-621 bid specifications, page 1, Petitioner's Trial Exhibit No. 1.

[12]Answer to paragraph 69 of Request for Admissions (R1-15, R1-18, R1-22).

[13]Transcript of hearing before Judge Kehoe, December 19, 1979, at 64, Petitioner's Exhibit No. 15.

[14]Transcript of hearing before Judge Kehoe, December 19, 1979, at 64.

Failure to comply with the MBE requirements would be excused if the bidder could demonstrate the following:

> 1. "It has made every reasonable effort to contact and negotiate with minority contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;"
>
> 2. "It was unable, not withstanding such efforts, to achieve the stated goal because minority contractors were not qualified or were unavailable;"
>
> 3. "It included in its schedule such proposed agreements as could be made with such efforts."[15]

Porter presented uncontroverted evidence as to the unavailability of minorities capable of either supplying materials or performing work on this specialized manufacturing contract. Although the County knew of no minorities that could have been used, it nevertheless denied Porter the contract.

Because Porter was not awarded Contract Y-621, it suffered lost profits of $1,510,544.[16] Porter sued to recover for the wrongful denial of the contract. Jurisdiction in the trial court was predicated on the existence of a Federal Question and diversity of

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[15]Contract Y-621 Addendum 3, Article 3, §3C, at 4, Petitioner's Trial Exhibit No. 1. See also Answer to paragraph 13 of the Complaint. (R1-27-1)

[16]See Affidavit of Richard D. Lillard and Petitioner's Trial Exhibit Nos. 19 and 20.

citizenship. The claims for relief were: (1) whether the MBE program promulgated by UMTA and MDC was violative of U.S. Const., Amend. XIV, 42 U.S.C. § 1981, 42 U.S.C. § 2000d and 49 U.S.C. § 1615; (2) whether MDC acted unconstitutionally by employing a 5% MBE participation provision in its bidding procedure for contract Y-621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y-621 to Porter. The case was disposed of in favor of the County on cross motion for summary judgment.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. SUMMARY

The decision of the Eleventh Circuit Court of Appeals in *Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987) directly conflicts with the decision of the Fourth Circuit Court of Appeals in the case of *Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). Furthermore, the decision below concerns two important questions of Federal law that will continually arise and should be decided by the Supreme Court. Petitioner's argument on these points can be briefly summarized as follows.

The common thread running through the Supreme Court's recent decisions concerning minority preference programs is that such programs must be based upon "findings of prior discrimination" and must be "narrowly tailored" so as to go no further than necessary to undo the present effects of past

discrimination.[17] In the case below, the Eleventh Circuit held that generalized statements in the legislative history of the Surface Transportation Assistance Act (STAA) concerning a DOT initiative to encourage MBE participation in DOT programs was sufficient to satisfy the requirement of a governmental finding of prior discrimination. Having determined that Congress has identified discrimination on a national level, the court validated an MBE program that delegated entirely to local governments the responsibility of determining the goals for MBE participation without providing the local officials with any information as to the history of past discrimination that the goals were supposed to remedy.

Under the circumstances the local officials could not possibly "narrowly tailor" the remedy to a history of past discrimination. Such a program is facially defective.

The other issue presented for review concerns the application of the DOT MBE program to Porter. The County in the present case readily admitted that it did not follow the DOT's mandate to determine the availability of qualified minorities to participate in the contract. Indeed, the Eleventh Circuit recognized the total absence of any effort on the part of the county to narrowly tailor the remedy it imposed. Nevertheless, the Court of Appeals validated Dade County's 5% goal solely on the basis that it was a smaller percentage than

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[17] *United States v. Paradise*, ___ US ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

the percentage goals approved by the Supreme Court in other cases. This miopic rationalization ignores the fact that other MBE goals involved totally different industries, different local governments, different regions of the country and were imposed at different times.

The Eleventh Circuit's determination that MBE goals can be set blindly if they are relatively small is an open invitation for governments to chip away at the Equal Protection Rights of Citizens and should be corrected by this Court.

B. The Relevant Supreme Court Decisions

Since *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Supreme Court has decided several cases dealing with governmental programs which give preferences to minorities.[18] Although these cases did not produce majority opinions, several common threads run through the various concurring opinions. First, it seems clear that Congress has a compelling interest in eradicating the continuing effects of past discrimination against minorities in regard to their participation in government contracts. *Fullilove v. Klutznick*, 448 U.S. 448, 497, 100 S.Ct. 2758, 2784, 65 L.Ed.2d 902, 936 (Powell, J., concurring), and in remedying past and present discrimination against minorities by state actors. *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, ____, 94 L.Ed. 203, 220 (1987). It also appears

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[18] *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

that governmental bodies may employ racial classifications that are essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *Id.* at ____, 107 S.Ct. at 1064, 94 L.Ed.2d at 220. However, the "Court has never held that societal discrimination alone is sufficient to justify a racial classification. *Wygant v. Jackson Board of Education*, 476 U.S. 267, ____, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260, 269 (1986). Rather, in each of the recent Supreme Court cases, the common thread has been a requirement that there be some showing of prior discrimination *by the governmental unit involved* before allowing the limited use of racial classifications in order to remedy such discrimination. *See, e.g., Id.*; *Fullilove*, 448 U.S. at 497, 100 S.Ct. at ____, 65 L.Ed.2d at 936; *Bakke*, 438 U.S. at 307, 98 S.Ct. at 2733, 57 L.Ed.2d at 782.

The other common thread apparent in these cases is the need to have a "narrowly tailored" remedy. The means chosen to eliminate the present effects of past discrimination must be "narrowly tailored" to the achievement of the compelling goal of remedying past discrimination. *Paradise*, ____ U.S. at ____, 107 S.Ct. at ____, 94 L.Ed.2d at 231; *Wygant*, 476 U.S. at ____, 106 S.Ct. at ____, 90 L.Ed.2d at 268; *Fullilove*, 448 U.S. at 498, 100 S.Ct. at ____, 65 L.Ed.2d at 937 (Powell, J., concurring); *Bakke*, 438 U.S. at 305, 98 S.Ct. at ____, 57 L.Ed.2d at 781.

C. The Importance of the Questions Presented

Both of the questions presented relate to how to define the common thread in recent Supreme Court cases concerning the "narrowly tailored" remedy

requirement. The first question is whether Congress or an administrative agency can declare the existence of a compelling interest in establishing minority preference plans and then delegate the responsibility for creating a remedy to local government without providing the local government .with information concerning relevant past discrimination or directing that such information be compiled by the local government before implementing the remedy. The facts of this case illustrate the need for a decision on this point.

Dade County, Florida was asked to establish an MBE goal that preferred among other groups "Alaskan natives". It should be apparent that Dade County has no expertise on this point. Yet the County's reaction was to set a goal that was the same for Alaskan natives as it was for Blacks, Hispanics, Asian Americans and women. Add to this the fact that Porter had to meet the goal at its Plant in Pittsburgh, Pennsylvania and the national dimension and impact of the program become apparent. What the DOT did was to delegate to Dade County the duty to narrowly tailor a remedy to resolve a national problem, the dimensions of which Dade County could not possibly understand.

It is true that in *Fullilove* this Court held that *Congress* could conclude based upon a historical basis without preambulatory findings that minority businesses had been denied effective participation in public contracting opportunities. *Fullilove*, 448 U.S. at 477-78, 100 S.CT. at 2774, 65 L.ED.2d at 924. Congress may legislate without compiling the kind of record appropriate with respect to judicial or administrative hearings. *Id.* In *Fullilove*, however, *Congress itself* not

only determined the compelling interest but also narrowly tailored the remedy. *Id.* In the present case, a *governmental administrative agency* relied upon a compelling interest allegedly determined by Congress and *delegated* the duty to narrowly tailor a remedy without regard to the nature of the compelling interest or providing evidence of past discrimination.

No information concerning evidence of relevant past discrimination was supplied by the DOT to the local entity responsible for tailoring an MBE program nor was there a directive that such data be compiled. *See generally*, DOT Order 4007.7A (March 6, 1978); DOT Circular 1165.1 (December 30, 1977).[19] It is clear from what happened in this case that the Court's previously expressed concern about overly broad or conclusionary remedies will be ignored repeatedly unless a decision is made regarding the extent to which the duty to fashion race and sex conscious remedies can be delegated and the information which must accompany the delegation.

The second question concerns the ability of reviewing courts to rubber stamp minority preference programs, simply because the percentage of the

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[19]Indeed the UMTA circular defining the program specifically invisioned that the geographic basis for setting certain types of MBE goals would have to be national as opposed to local. Yet rather than enlighten Dade County as to the history of prior discrimination perceived to exist by region or otherwise, the UMTA circular simply directed the county to use a "common sense approach." *See* UMTA Circular 1165.1 (Dec. 30, 1977) at page 6. A copy of the relevant portion of the UMTA Circular, entitled "Percentage Goals for the Dollar Value of Work to be Awarded to MBEs" is included in the Appendix to this Petition.

preference is relatively small. If not addressed every minority preference program in the country could be validated if it was less than the 10% set aside in *Fullilove*. The important principle that race conscious remedies be narowly tailored will be consistently ignored if governmental units can practice in little increments the discrimination clearly forbidden in larger doses.

D. Conflict Among the Circuits

As to the meaning of the common thread in the court's opinion that a race conscious remedy should be narrowly tailored, there would appear to be a conflict in interpretation between the Fourth and the Eleventh Circuits. *Compare Croson Co. v. City of Richmond*, 822 F.2d 1353 (4th Cir. 1987) *with Porter*, 825 F.2d 324 (11th Cir. 1987). In *Croson*, the Fourth Circuit Court of Appeals held that a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. *Croson*, 822 F.2d at 1357. The court, in its examination of where the City's minority preference plan was narrowly tailored, held that "[f]indings of societal discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*' " *Id.* at 1358 (quoting *Wygant*, 476 U.S. at ____, 106 S.Ct. at 1847, 90 L.Ed.2d at 269) (emphasis in the original). This requirement was found to be essential to prevent local governments from adopting "sweeping racial preferences at their pleasure, whether they were legitimate remedial measures or bald dispensations of public funds and employment based on politics of race. *Id.* at 1358.

Similar to the situation in *Porter*, the court found that the local entity involved thought it was permissible to simply adopt a contract set aside identical to the one upheld in *Fullilove*. *Id.* at 1359. As in *Porter*, much of the discussion in the hearings concerning the plan were based on the premise that it was permissible to adopt such an identical plan. *Id.* The court found, however, that national findings alone do not establish the need for action in a particular locality. *Id.* If they were sufficient, they would undercut *Wygant's* rejection of societal discrimination as a basis for remedial action. *Id.* at 1359-60. The court also emphasized that the minority preference plan upheld in *Fullilove* was based on this court's emphasis upon Congress' special competence to act on its finding that a minority preference plan was needed on a national level. *Id.* at 1360.

The Fourth Circuit in *Croson* ultimately held the thirty percent set aside in question to be invalid as that figure had "simply emerged from the mists," was chosen arbitrarily, and failed to be tied to a relevant percentage of minority owned subcontractors in the relevant geographical area. *Id.*

The court also found that the definition of minority owned business, which is very similar to the definition of MBE in *Porter*, was not itself narrowly tailored to the remedying of past discrimination. The definition of minority to include citizens who were Blacks, Spanish-speaking, Orientals, Indians, Eskimos or aliens, again similar to the definition in *Porter*, illustrated the undifferentiated nature of the plan. *Id.* at 1361. No explanation was given as to why these particular

minorities were favored or that the government entity involved had ever engaged in discrimination against each of these groups. *Id.*

Finally, the *Croson* court noted that while a waiver provision may help to narrow the scope of a minority preference plan's operation, a waiver cannot cure constitutional defects such as the lack of participated findings of discrimination. *Id.* at 1361. Like the waiver provision in *Porter*, the waiver provision in *Croson* was limited to exceptional circumstances and was a matter of administrative discretion. *Id.*

In contrast, the Eleventh Circuit in *Porter* took a different approach in regard to this Court's concern that minority-preference plans be narrowly tailored. Prior to its analysis of whether the MDC minority preference plan was narrowly tailored, the Eleventh Circuit referred to the same language in *Wygant* interpreted by the Fourth Circuit in *Croson*. *Porter*, 825 F.2d at 331 (citing *Wygant*, 467 U.S. at ____, 106 S.Ct. at 1847, 90 L.Ed.2d at 269). This language reflected this Court's concern that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* Nevertheless, the Eleventh Circuit held that MDC was not required to make detailed and specific findings concerning past discrimination as MDC was entitled to rely on Congress' general legislative findings that clearly established that minorities were not participating in government contracts. *Id.* at 331 (citing *Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774, 63 L.Ed.2d at 924). As Congress was concerned about a national

problem, Congress' findings provided adequate support for local projects such as the one implemented by MDC. *Id.*

Thus, it was of no significance to the court that the public record in *Porter* reflected that MDC *had not* conducted detailed studies regarding past discrimination against MBE's in the awarding of contracts or conducted investigations regarding the availability of qualified MBE's to participate in its plan. *Id.* at 332. In addition, while "troubled" by MDC's decision to use the five percent figure without supporting or substantiating it in regard to the relevant labor market, the court upheld this arbitrary percentage simply because other federal courts had upheld minority preference plans utilizing much higher percentages. *Id.*

Clearly, the Eleventh Circuit's approach disregards the concern announced in *Bakke, Fullilove* and *Wygant, supra* that a minority preference program be in truth and in fact narrowly tailored. By contrast the approach taken in *Croson* illustrates respect for the important principle that race and sex conscious remedial action be narrowly tailored.

CONCLUSION

It is respectfully suggested that the Court accept jurisdiction to review the decision entered in this cause by the Eleventh Circuit Court of Appeals.